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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Fees for Ancillary or Supplementary)
Use of Digital Television Spectrum)
Pursuant to Section 336(e)(1))
of the Telecommunications Act of 1996)

MM Docket No. 97-247

TO: The Commission

COMMENTS OF
THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS
AND THE PUBLIC BROADCASTING SERVICE

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SUMMARY

The Commission should grant public television licensees an exemption from any obligation to pay a fee in connection with ancillary or supplementary services offered on their excess digital capacity. Such an exemption would be consistent with the statutory provision requiring the establishment of a fee collection program. Section 336(e)(2) of the Telecommunications Act of 1996 provides that such a program must serve certain purposes. As discussed herein, the specified purposes plainly would not be served by imposition of a fee on noncommercial licensees that use revenue from ancillary or supplementary services to support their mission-related activities. It would therefore be contrary to congressional intent to assess such a fee.

An exemption for public television licensees would be consistent with other congressional and regulatory policies. Congress has articulated a policy of universal access to public television and has provided longstanding federal funding in support of that policy. The Commission has recognized in other contexts that imposing fees on entities that receive federal funding in support of activities that serve the public interest would be inappropriate, since it would dilute the financial support provided by Congress. The same rationale supports a fee exemption for public television licensees that use excess digital capacity to generate revenue to support their mission-related activities.

There is no basis for concluding that a fee exemption for public television licensees would have any adverse effect on other providers of ancillary or supplementary services and any prediction of such an effect would be pure conjecture. In any event, there is no inappropriate commercial benefit to public television licensees where the revenue they receive is used to support their mission-related activities. Rather, it is the public who would benefit from public television licensees' ability to retain revenue to support their mission-related activities.

To support the grant of a fee exemption, the Commission should require simply that the licensee (1) hold a noncommercial educational broadcast license from the Commission, (2) receive a community services grant from the Corporation for Public Broadcasting, and (3) use its revenues received in connection with ancillary or supplementary services to support the licensee's mission-related activities. A written certification on these points by a responsible official of the licensee should be sufficient.

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AND THE PUBLIC BROADCASTING SERVICE**

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") submit these comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking, released on December 19, 1997, in the above-captioned proceeding ("Notice"). APTS and PBS are nonprofit membership organizations whose members are licensees of virtually all of the nation's public television stations. APTS serves as the national representative of these stations, presenting their views and participating in proceedings before Congress and executive and administrative agencies, and in other venues. PBS provides national program distribution and other program-related services to the nation's public television stations and the general public.

The Telecommunications Act of 1996 ("the 1996 Act") requires the Commission to adopt rules permitting digital television licensees to "offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity," 47 U.S.C. § 336(a), and to establish a program to assess fees in connection with such services, *id.* § 336(e). APTS and PBS file

these comments to urge the Commission to exempt public television licensees from an obligation to pay fees on revenue-generating ancillary or supplementary services when the licensee uses the revenues from these services as a source of funding for activities related to its non-profit, educational and public service mission ("mission-related activities"). As explained in these comments, such an exemption would be consistent with the terms of the 1996 Act, as well as with other congressional and regulatory policies.¹

I. INTRODUCTION.

A. Public Television's Leadership in Digital Technology.

For over 30 years, public television has been an active participant in the development and use of innovative technologies to serve the goals of education and public service. Using the most current technology, public television ensures that viewers of all ages and abilities, from every socioeconomic level and geographic location, have access to the highest quality noncommercial educational and cultural programming. Public broadcasters employ a combination of technologies, including broadcast, satellite networks, DBS, cable, datacasting, closed captioning, interactive video discs, and the Internet, to educate millions of children and adults at home, in classrooms, in daycare centers, and at work.

This tradition of leadership continues in the development of digital technology. Among other things, public television has played an active role in developing the digital transmission standard and in testing various forms of digital

¹ APTS and PBS initially outlined the need for such an exemption in their Petition for Reconsideration and Clarification of the Commission's Fifth Report and Order in the digital television proceeding. See In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, Petition for Reconsideration and Clarification of APTS and PBS, filed June 13, 1997, p. 28 n.29.

technology.² Indeed, public broadcasters were the first North American broadcasters to develop all-digital networks and technical facilities. And several major market public television stations are currently on the air transmitting digital signals with experimental licenses.

B. Public Television's Plans for Use of Digital Technology to Further Its Educational and Public Service Mission.

In anticipation of the upcoming conversion to digital, public broadcasting has undertaken a comprehensive planning process to shape its digital future. The analysis sought to identify educational programming needs that are not met, or are not adequately met, in the commercial marketplace and that public broadcasting is uniquely well-positioned to meet. As a result of this planning process, public broadcasting expects to focus particular attention on using digital technology in connection with (1) early childhood services (including expansion of the Ready to Learn service); (2) technology integration in K-12 education (with the goal of making enhanced K-12 services available to all schools); (3) workforce education and training (with the goal of increasing the reach of post-secondary telecourses and workplace training so that they will be available to all adult learners and workers); and (4) accessibility to digital services by unserved and underserved audiences (particularly physically challenged and non-English speaking people).

² Public broadcasters played an active role in developing the transmission system for digital advanced television known as the "Grand Alliance" system, and served on the Commission's Advisory Committee on Advanced Television Service, whose recommendations gave rise to the adoption of the "ATSC Standard." In addition, PBS was one of the founding members of the Advanced Television Test Center, which conducted laboratory tests of the Grand Alliance System. PBS also conducted field tests of the Grand Alliance system in Charlotte, North Carolina. WMVT, the public television station in Milwaukee, was the first broadcaster to provide an HDTV satellite test signal. And KCTS in Seattle was the first public broadcaster to begin transmitting digital signals using the ATSC standard, and was the first station in the United States to produce HDTV programming.

Public television expects to use digital technology in a variety of ways in fulfilling its educational and public service mission. High definition television will significantly enhance viewers' enjoyment of many public television signature programs that are well suited to this new technology. This includes, in particular, programs focused on the performing arts, drama and theater, science and nature, and travel and exploration.

Digital technology also will allow multicasting of standard definition programming, allowing public television to bring significantly more public service educational programming to new audiences. For example, on a single digital channel a public broadcaster could carry, in addition to its current programming, a dedicated children's channel, an adult lifelong learning channel, and a local programming channel. Multicasting will also permit public television to provide a more comprehensive Ready to Learn service to children, parents and caregivers³ and will allow more stations to provide K-12 services to more elementary and secondary students throughout the country.

In addition, digital technology will enable public television to expand the way in which it communicates with audiences. The ability to integrate video-based programs with on-line data will allow students and teachers to download course material, textbooks, teacher and student guides, and teacher training material embedded in instructional programming.⁴

³ Although many public television stations can offer the basic video portion of the Ready to Learn service, some stations are unable to offer a full range of Ready to Learn programs due to limited channel capacity and the commitment to meet other educational needs of their viewers. Multicasting will make it possible for stations to carry the full complement of Ready to Learn programming.

⁴ The data delivery capability of digital technology will enhance the quality of Ready to Learn, making it possible to customize the service and provide interactive

APTS and PBS anticipate that some public television licensees will also choose to use a portion of their digital capacity to offer revenue-generating services as a means of supporting their mission-related activities.⁵ This is similar to the practice by which some public television stations lease excess capacity on the vertical blanking interval ("VBI") of their current broadcast channel.⁶ It is also similar to PBS's practice of leasing excess capacity on its satellite transponders to commercial programming and other service providers.⁷ The revenues generated through leasing of this excess VBI and satellite capacity are used to defray costs associated with public television's mission-related activities. Use of excess digital capacity to offer revenue-generating

training and other supplemental material to parents and caregivers to address specific needs of children. For example, data embedded in *Sesame Street* will allow caregivers to download educational exercises and games during the program.

⁵ The Commission has indicated that it will defer to a separate rulemaking consideration of the permissible uses of the digital spectrum by public television licensees. APTS and PBS will be filing comments in response to any such notice of proposed rulemaking and therefore will not address here the issue of permissible spectrum use. For purposes of these comments, we assume public television licensees have full flexibility to use excess digital capacity to provide ancillary or supplementary services. See 47 U.S.C. § 336(a); 47 CFR 73.624(c).

⁶ PBS, through a for-profit subsidiary -- National Datacast, Inc. ("Datacast") -- manages nationwide commercial data distribution and broadcasting services utilizing stations' VBI. Noncommercial educational television stations provide some of their excess VBI capacity to Datacast. Datacast then provides services utilizing this capacity for a fee to electronic information services and programming providers, which offer services, such as programming guides to television viewers and educational content and other information services to computer users. In addition to transmitting their own program information, Datacast's customers transmit some educational programming created by PBS. A portion of the revenues Datacast receives are paid to PBS and individual public television stations.

⁷ PBS primarily uses its satellite transponder capacity to transmit public television programming to public television stations around the country. Capacity that is not needed for public television uses is leased at reduced rates to national educational satellite programmers to distribute educational programming. If capacity remains after these needs are met, PBS enters into short-term lease arrangements with commercial programming providers. The revenues generated through leasing capacity on the PBS transponders are used to reduce the annual fees paid to PBS by its member stations.

services could provide a further source of revenue that public television stations could use to help fund these activities.

II. PUBLIC TELEVISION LICENSEES SHOULD BE EXEMPT FROM ANY OBLIGATION TO PAY FEES IN CONNECTION WITH OFFERING ANCILLARY OR SUPPLEMENTARY SERVICES ON THEIR EXCESS DIGITAL CAPACITY.

A. Creation of an Exemption Would Be Consistent with the Terms of the 1996 Act.

An exemption from any fee obligation for public television licensees is consistent with the terms of the 1996 Act. The statute requires that the Commission establish a program to collect a fee where a licensee's digital spectrum is used for ancillary or supplementary services. However, any fee program or schedule must "promote[] the objectives described in subparagraphs (A) and (B) of paragraph (2)." 47 U.S.C. § 336(e)(1).

Under Section 336(e)(2), the purposes to be served by any fee collection program are (a) to "recover for the public a portion of the value of the public spectrum resource made available for . . . commercial use;" (b) to "avoid unjust enrichment;" and (c) to "recover for the public an amount" that equals (so far as possible) the amount that would have been received if the services in question had been subject to competitive bidding under 47 U.S.C. § 309(j). These purposes clearly do not support imposition of any fee in connection with ancillary or supplementary services offered by noncommercial stations that use the revenue from these services to support their mission-related activities.

Where the revenue is used to support noncommercial services that Congress has declared to be in the public interest, there is no need to "recover" anything for the public; that revenue already is being devoted to public purposes. Furthermore,

since these revenues help to support noncommercial activities, the provision of ancillary or supplementary services would not result in any "unjust enrichment" of the stations. Finally, the provision governing the amount to be recovered through any fee makes no sense in the context of public television. For public television licensees, there is no amount that fits the standard stated under Section 336(e)(2)(B), i.e., the amount that would have been received if the excess digital spectrum had been subject to competitive bidding pursuant to 47 U.S.C. § 309(j). Under 47 U.S.C. § 309(j)(2), the Commission's competitive bidding authority does not apply to licenses issued for a "noncommercial educational broadcast station" or "public broadcast station." See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(2)(C), 111 Stat. 258 (exemption for "stations described in section 397(6) of this Act").

Because the statutory purposes to be served by any fee collection program plainly are not applicable to services provided by public television licensees, it would be contrary to congressional intent to assess a fee in connection with those services. The statute itself therefore requires an exemption from fees on ancillary and supplementary services offered by public television licensees that use revenues from these services as a source of funding for their mission-related activities.

B. Creation of an Exemption Would Be Consistent with Other Congressional and Regulatory Policies.

An exemption from fees relating to ancillary or supplementary services offered by public television licensees would be consistent with both broader congressional policies and other exemptions that the Commission has established. There is a longstanding congressional policy to provide federal financial support for public television. Congress has stated explicitly that it is necessary and appropriate for the federal government to "complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the

United States." 47 U.S.C. § 396(a)(7).⁸ Congress repeatedly has reaffirmed its commitment to universal access to public service programming in its appropriations deliberations and in its reauthorization of funding.⁹ Public broadcasters' efforts to generate revenues from ancillary or supplementary uses of the digital spectrum to support their mission-related activities are consistent with this national policy.

The Commission has recognized on various occasions that placing an assessment on revenues used to support federally funded activities that serve the public interest would be inappropriate and has granted exemptions on that basis. For example, the Commission recently concluded that nonprofit educational institutions should not be required to contribute to universal service support based on revenues derived through leasing of excess capacity. The Commission explained that requiring these nonprofit entities to make a universal service contribution would have the effect of reducing the amount of universal service support they receive and therefore would be counterproductive. See In the Matter of Federal-State Joint Board on Universal Service, Fourth Order on Reconsideration and Report and Order, CC Docket No. 96-45, et al., ¶ 284 (rel. Dec. 30, 1997).¹⁰

⁸ See The Educational Television Facilities Act, Pub. L. No. 87-447, §392(d), 76 Stat. 64, 66 (1962) (authorizing funds for the construction of educational television stations to ensure service to the "greatest number of persons"); Public Broadcasting Act of 1967, 47 U.S.C. § 390 (1994) (providing additional funding to "improve the facilities and program quality of the Nation's educational broadcasting stations"); Public Telecommunications Facilities Act of 1992, 47 U.S.C. § 396(a)(9) (1994) (stating that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies").

⁹ Since 1967, Congress has appropriated approximately \$4.67 billion (through FY 1998) to fund public service programming through the Corporation for Public Broadcasting, and approximately \$734.8 million (through FY 1998) for the planning and construction of public television and radio facilities, including the public broadcasting satellite distribution system.

¹⁰ The Commission also exempted noncommercial educational television stations

The Commission consistently has concluded that "exacting fees from noncommercial educational applicants would dilute the financial support offered by Congress."¹¹ The Commission has recognized that this concern formed the basis for Congress' decision to exempt public broadcasters from the application and regulatory fees that are paid by commercial communications entities.¹² Among other things, the Commission has observed that these congressional exemptions were "apparently intended to enhance the financial support for these services beyond that provided by the Corporation for Public Broadcasting ("CPB") and National Telecommunications Information Administration ("NTIA") facilities grants."¹³

The rationale described by the Commission supports a fee exemption for public television licensees that use excess digital capacity to offer ancillary or supplementary services to support their mission-related activities.¹⁴ In recent years,

from a universal service obligation. See id. ¶ 283.

¹¹ See In the Matter of Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Docket No. 86-285 ("Application Fees Proceeding"), 3 FCC Rcd 5987, 5988 (1988); In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, MM Docket 94-19 ("Regulatory Fees Proceeding"), 9 FCC Rcd 6957, 6967 (1994).

¹² See Application Fees Proceeding, 51 Fed. Reg. 25792, 25798 n.57 (1986); Regulatory Fees Proceeding, 9 FCC Rcd at 6967; see also 47 C.F.R. §§ 1.1112 (application fees), 1.1162 (regulatory fees).

¹³ Application Fees Proceeding, 3 FCC Rcd at 5988.

¹⁴ In concluding that Congress had exempted public television stations from payment of application fees and regulatory fees, the Commission cited the explicit reference to commercial licensees in the statute itself, and the mention of a noncommercial exemption in the congressional reports. Here Congress has not explicitly distinguished between commercial and noncommercial licensees. However, as explained above, the statutory language regarding the purposes of any fee collection program for ancillary or supplementary services plainly is inapplicable to noncommercial educational television licensees that use the revenue from such services to support their mission-related activities.

Congress has placed increasing pressure on public broadcasters to make efficient use of their federal funding and to supplement such funding with new sources of revenue to support their mission. As a result, public television is continually seeking innovative ways to do so.¹⁵ Permitting public television stations to apply the revenue generated from their excess digital spectrum as a source of funding for their mission-related operations (including the costs of the digital transition) is consistent with congressional directives to public broadcasters to make wise use of their limited resources.¹⁶

Imposition of a fee would be counterproductive, detracting from the federal financial support for public broadcasting and placing additional pressure on that support. In effect, imposing a fee where revenue is used to support a public television licensee's mission-related activities amounts to "robbing Peter to pay Paul." By crafting an exemption for public television licensees, the Commission will help ensure that public television is able to provide diverse and innovative educational programming and related services in this century and beyond. Such an exemption

¹⁵ Congressional authorization for public broadcasters to engage in revenue generating activities with certain restrictions was granted in 47 U.S.C. § 399(b).

¹⁶ The Commission's mandate that all public television stations implement digital broadcasting by 2003 imposes a tremendous financial burden on these stations. We estimate that the costs of transitioning public broadcasting stations to digital services (including facilities construction and dual analog and digital operation during the transition) will exceed \$1.7 billion.

The Commission has recognized that public television will need assistance in connection with the transition to digital. In its Fifth Report and Order issued in the digital television proceeding, the Commission noted "the financial difficulties faced by noncommercial stations." Because "noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV," the Commission expressed its intent "to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television." Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, MM Docket No. 87-268, ¶ 101 (rel. Apr. 21, 1997).

would be fully consistent with Congress' continued support for universal access to public television, as well as its strong encouragement to public television to supplement its limited financial resources with non-federal revenue sources.

C. There is No Basis for Concluding That a Fee Exemption for Public Television Licensees Will Have an Adverse Effect on Other Providers of Ancillary or Supplementary Services.

In its request for comments, the Commission has inquired about the possible effect on other providers of ancillary or supplementary services if noncommercial broadcasters are exempt from a fee. There is no basis at this time for concluding that there would be any adverse effect on other providers. Any prediction of such effect during this time of significant change in the delivery of telecommunications services would be pure conjecture. Because the amount of digital spectrum available to public broadcasters to use for revenue-generating ancillary or supplementary services represents a small portion of the total capacity of all television licensees and other providers that would be available for such services in any given market, the economic effect, if any, would be minimal.

In any event, there is no inappropriate commercial benefit to public television licensees where the revenue they receive is used to support their mission-related activities. It is the public who would benefit from public television's ability to apply its scarce financial resources to the delivery of educational services to homes, schools, daycare facilities and job sites.

As explained above, an exemption for public television is clearly appropriate in light of (1) the fact that the statutory purposes clearly would not be served by imposing a fee on public broadcasters that use revenues to support their mission-related activities, (2) the longstanding congressional policy of providing federal

financial support for extending public broadcasting service to all Americans, (3) the limited financial resources available to public television, and (4) Congress' encouragement of public television's development of new revenue sources. These are the points that should govern the Commission's decision on this issue, rather than unfounded speculation about whether public broadcasters might receive some "competitive" advantage from such an exemption.

III. THE FORM OF THE EXEMPTION.

The form of the exemption should be simple and straightforward. Any television licensee that (a) has qualified for a noncommercial educational television license or permit from the Commission, (b) has qualified to receive a community services grant from the Corporation for Public Broadcasting, and (c) uses its revenues from ancillary or supplementary services to support its mission-related activities, should be exempt from paying a fee. To the extent the Commission imposes paperwork requirements in connection with a fee program for ancillary or supplementary services, it should be sufficient for a responsible official of a licensee claiming an exemption to provide a written certification on these points.

CONCLUSION

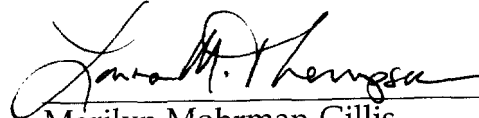
For the reasons stated above, the Commission should exempt public television licensees from any fee assessed in connection with use of digital spectrum for

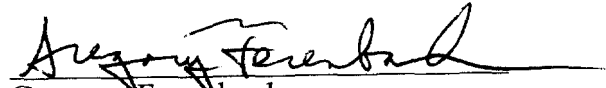
ancillary or supplementary services to the extent revenues from those services are used to support the licensee's mission-related activities.

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